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IN THE

Supreme Court of the United States

GARY DAVENPORT, *et al.*,
Petitioners,

v.

WASHINGTON EDUCATION ASSOCIATION,
Respondent.

WASHINGTON,
Petitioner,

v.

WASHINGTON EDUCATION ASSOCIATION,
Respondent.

On Writs of Certiorari to the Supreme Court of Washington

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND CHANGE TO WIN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and Change to Win (CTW) file this brief *amici curiae* in support of respondent with the consent of the parties as provided for in the Rules of this Court.[1] The AFL-CIO is a federation of 54 national and

[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

international labor organizations with a total membership of 10 million working men and women. CTW is a federation of seven national and international labor organizations with a total membership of six million working men and women.

SUMMARY OF ARGUMENT

I. Section 760 of the Washington campaign finance law imposes a precondition on a union's otherwise unfettered right to use its general treasury funds to make political "expenditures" in state elections, and on the union's right to use such funds to make "contributions" to state candidates and other political committees, subject to amount limits that identically apply to all other non-party groups. By its terms and as authoritatively construed by the Supreme Court of Washington, the state's campaign law was adopted in order to prevent corruption and its appearance, but the state eschews a governmental interest in protecting the rights of individuals beyond the constitutional framework set forth in this Court's agency fee jurisprudence.

Washington's campaign law differs substantially from the Federal Election Campaign Act, which absolutely prohibits unions (and corporations) from making expenditures and contributions in federal elections, in part also to prevent corruption and its appearance. Washington's anti-corruption interest is substantially different. That interest does not justify prohibitions or limits on union political expenditures, or Section 760's prior-authorization constraint on them. As for union contributions, Washington's amount limits fully achieve the state's anti-corruption intent, and Section 760 neither furthers that interest directly nor prevents circumvention of the limits.

Section 760 is also fatally under-inclusive in two respects. First, it pertains to a kind of funds received only by unions, and imposes no comparable authorization requirement upon other organizations that are also funded by individuals and groups that do not necessarily support their recipients' politi-

cal expenditures and contributions. Second, Section 760 pertains only to union electoral speech, a content-based restriction that is particularly suspect and that undermines the credibility of the rationale proffered in support of it.

II. This Court has held that agency shop arrangements requiring all union-represented employees to pay either union dues or an agency fee equal to dues is a constitutional means of distributing the costs of representation among the benefited group of employees. To protect against such an arrangement being used to compel support for political or ideological activities unrelated to collective bargaining, this Court has also held that unions may not collect and expend agency fees over the objections of nonmember agency fee payers on activities that are not germane to collective bargaining. In so holding, the Court has repeatedly specified that "dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee."

The Davenport petitioners argue that this Court's repeated statement that "'dissent is not to be presumed' . . . applies only to voluntary union members." Davenport Br. 31. That argument rests on a misunderstanding of the facts of the cases cited in support and of the nature of the agency fee objection right. The Court has never used that phrase in connection with "voluntary union members." What is more, the Court's articulation of the agency fee objection right makes clear that it is a right to avoid compelled subsidization of nongermane union activities by expressing an objection to the union.

ARGUMENT

Section 760 of the Washington Fair Campaign Practices Act provides:

> "A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless

affirmatively authorized by the individual." Wash. Rev. Code. § 42.17.760.

As the brief for respondent Washington Education Association (WEA) ably demonstrates, Section 760 is a unique piece of state legislation limiting union political activity in state elections that cannot be justified either as a proper campaign finance regulation or as a proper limitation on the negotiation and enforcement of agency shop agreements. Rather than repeat the arguments advanced by the WEA, we confine ourselves to two points in this brief. First, we show that Section 760 bears no relation to the State of Washington's interests with regard to regulating campaign financing. Second, we show that the attempt of the Davenport petitioners to defend Section 760 as protecting the First Amendment rights of agency shop fee payers rests on a gross misreading of this Court's precedents.

I. SECTION 760 DOES NOT SERVE WASHINGTON STATE'S INTERESTS IN REGULATING CAMPAIGN FINANCES.

A. Section 760 was enacted as part of a comprehensive ballot measure, Initiative Measure 134 ("Initiative 134"), "An Act Relating to the regulation of political contributions and expenditures," that voters in the State of Washington approved in 1992. "Prior to passage of Initiative 134, there were no restrictions on the type of funds a labor organization could use for contributions" or expenditures, *State ex rel. Evergreen Freedom Foundation v. Washington Education Association*, 140 Wash. 2d 615, 639, 999 P.2d 602, 615 (2000), and there have been no restrictions of any sort on the type of funds any other kind of group may spend politically in Washington elections. In conditioning a union's political use of funds derived from nonmember agency shop fee payers on those nonmembers' prior individual authorization of that

use,[2] Section 760 carved a solitary exception to a campaign finance system that otherwise sanctions the political deployment of private organizational money without regard to its source or the circumstances of its acquisition.

Specifically, except for Section 760, Washington's campaign finance law permits both individuals and groups, including unions, business corporations, non-profit corporations, trade and other associations, state political committees and other organizations, to make unrestricted use of their general treasury funds for election-related "expenditures," subject only to various disclosure and disclaimer requirements. See Wash. Rev. Code §§ 42.17.020(35), 42.17.80-.93, 42.17.100-42.17.120, 42.17.561-42.17.575. And, again except for Section 760, the state's law permits all such groups to use their general treasury funds to make "contributions" to state candidates, political parties and other political committees, subject to near-uniform monetary limits (only political party committees and caucus political committees are exempted) on how much they may contribute to those recipients. See Wash. Rev. Code. §§ 42.17.640(1), (6);[3] *State ex rel. Evergreen Freedom Foundation v. Washington Education Association*, 140 Wash. 2d at 638, 999 P.2d at 615 (the contribution law "does not distinguish between labor organizations and corporations and treats all donors equally."). For

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[2] The case at bar does not concern requirements on labor organizations to secure individual authorizations from their *members* before using dues attributable to them for political spending that is otherwise lawfully financed by the organization's general treasury funds.

[3] These contribution limits are inflation-adjusted, see Wash. Rev. Code § 42.17.690, and for the 2006 election cycle were set at $700 per election to candidates for state legislative office, $1,400 per election to candidates for other state offices, $3,500 per year to political party committees, and $700 per year to state legislative caucuses. See Wash. Rev. Code §§ 42.17.640(1), (6). Individuals are subject to the same limits as are groups for contributions to candidates, but they are not limited in their contributions to parties and caucuses. *See id.*

unions, corporations and other groups in Washington, separate segregated political accounts funded with individual voluntary funds are supplemental means for those organizations to engage in state political spending. See Wash. Rev. Code § 42.17.640.

Washington's campaign finance scheme is dramatically different from the regulation of *federal* elections under the Federal Election Campaign Act (FECA), 2 U.S.C. §§ 431 *et seq*. Under FECA, unions, business corporations and nonprofit corporations are *prohibited* from using their general treasury funds for electoral expenditures, including express advocacy to the general public of the election or defeat of clearly identified federal candidates, *see* 2 U.S.C. §§ 431 (17), 441b(a), and "electioneering communications," that is, election-proximate candidate-referential broadcasts that are targeted to the referenced candidate's electorate. See 2 U.S.C. §§ 434(f)(3), 441b(b)(2). FECA also prohibits these organizations from using *any* amount of general treasury funds to make contributions to federal candidates, national political party committees and other federal political committees. *See* 2 U.S.C. § 441b(a). Instead, under FECA, separate segregated accounts funded by individual voluntary contributions are the *sole* means for a union or a corporation to raise and direct funds for contributions and expenditures related to federal candidate elections. *See generally* 2 U.S.C. §§ 441b(b)(2)-(4); *McConnell v. Federal Election Commission*, 540 U.S. 93, 203-06 (2003).

The governmental purposes that Initiative 134 was enacted to serve are set forth in Sections 1 and 2 of the measure, which are codified at Wash. Rev. Code §§ 42.17.610, "Findings,"[4] and 42.17.620, "Intent."[5] Initiative 134 was prompted by the following concerns:

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[4] FINDINGS. The people of the state of Washington find and declare that:

> [T]hat wealth should not lead to a disproportionate or controlling influence over election of candidates; that more candidates were raising funds from special interest groups, leading to a public perception of improper influence by such groups over the decisions of elected officials; and that because more money was being raised from special interest groups, the public perception was created that "individuals have an insignificant role to play in the political process." The intent of the contribution limits in the act were to "[e]nsure that individuals and interest groups have fair and equal opportunity to influence elective and governmental processes;" to reduce large organizations' influence; and to restore public trust.

Washington State Republican Party v. Washington State Public Disclosure Commission, 141 Wash. 2d 245, 261-62, 4 P.3d 808, 818 (2000). *See also State ex rel. Public Disclosure Commission v. Washington Education Association*, 156 Wash. 2d 543, 556, 130 P.3d 352, 357 (2006); *State ex rel.*

> (1) The financial strength of certain individuals or organizations should not permit them to exercise a disproportionate or controlling influence on the election of candidates. (2) Rapidly increasing political campaign costs have led many candidates to raise larger percentages of money from special interests with a specific financial stake in matters before state government. This has caused the public perception that decisions of elected officials are being improperly influenced by monetary contributions. (3) Candidates are raising less money in small contributions from individuals and more money from special interests. This has created the public perception that individuals have an insignificant role to play in the political process.

[5] INTENT. By limiting campaign contributions, the people intend to:

> (1) Ensure that individuals and interest groups have fair and equal opportunity to influence elective and governmental processes; (2) Reduce the influence of large organizational contributors; and (3) Restore public trust in governmental institutions and the electoral process.

Evergreen Freedom Foundation v. Washington Education Association, 140 Wash. 2d at 638-39, 999 P.2d at 615.

Of special importance to the case at bar, absent from Initiative 134's identification of its governmental interests is any special protection for the political preferences of individuals whose moneys are paid into a union, corporation or other group, including any elevation beyond the well-settled constitutional framework described in Part II below for an individual nonmember to refrain from funding her collective bargaining representative's election-related (and other non-bargaining) spending. "There is no indication that in voting for I-134, the voters intended to provide more protection for nonmembers than that offered under federal constitutional principles." *State ex rel. Public Disclosure Commission v. Washington Education Association*, 156 Wash. 2d at 563, 130 P.3d at 361. "[T]he intent of the statute is to protect the public, not individual employees." *Id.* at 556, 130 P.3d at 357. And, because that law unrestrictedly *permits* unions (and corporations) to use their treasury funds to make political expenditures, as well as to make contributions up to certain limits, it "was [not] intended to achieve a similar result" regarding state elections as FECA was intended to achieve regarding federal elections. *See State ex rel. Evergreen Freedom Foundation v. Washington Education Association*, 140 Wash. 2d at 631, 999 P.2d at 612.

The Supreme Court of Washington's construction of the intent of Initiative 134 is "authoritative," *see Romer v. Evans*, 517 U.S. 620, 626 (1996), yet the petitioners fail to acknowledge that conclusive and critical finding and instead base their case on the objective specifically eschewed by the state's highest court—that the measure's purpose was to accord extraordinary protections to nonmembers' individual First Amendment rights by replacing the constitutionally sufficient notice and opportunity to object with the prerogative of affirmative authorization. See Brief for Petitioners ("Davenport Br.") 24 (No. 05-1589) ("The rational basis for

enacting § 760 is to ensure that everyone, including unions, has to secure the affirmative authorizing action from outsiders or nonmembers for political funds"); Brief for the Petitioner ("State Br.") 34 (No. 05-1657) ("The opt-in requirement of Section 760 serves an important purpose. It ensures that when the union uses nonmembers' fees to influence an election, this use is in accordance with the wishes of the nonmembers who pay the fees.").[6] But in its defense of its law, the state as litigant in this Court cannot rely upon an interest that did not influence it as the maker of that law. Nor do petitioners claim that Section 760 serves Initiative 134's actual purpose of preventing corruption or its appearance.

The constitutionality of Section 760 must be considered by examining whether it serves the particular purposes that actually undergird Washington's campaign finance law. *See, e.g., Nixon v. Shrink Missouri Government PAC*, 528 U.S. 382, 390 (2000) (upholding Missouri political contribution limits where "Missouri espouses th[e] same interests of preventing corruption and [its] appearance" as underlie FECA's contribution limits). As a matter of fundamental state policy, Washington has made a substantially different assessment about the appropriate role and influence of unions and other institutions in state elections than has the Congress concerning their role and influence in federal elections. Washington does not consider institutional funds to be corrupting when used for political expression, considers institutional funds to be corrupting only when used for contributions beyond certain thresholds, and does not consider the interests of

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[6] The United States, mischaracterizes the Washington Supreme Court's analysis as simply "recogniz[ing]" that Section 760 serves Initiative 134's fundamental anti-corruption purpose. See Brief for the United States as Amicus Curiae Supporting Petitioner ("U.S. Br.") 13.

individuals or groups who paid into those funds to be implicated by corruption or other concerns.[7]

B. Section 760 imposes a direct restraint on the ability of Washington labor organizations to make "expenditures," including all spending related to candidate and ballot measure[8] elections that is within the reach of the state's campaign finance law (and that is not also a contribution). See Wash. Rev. Code § 42.17.020(22); *cf.* Wash. Rev. Code § 42.17.020(15) (definition of "contribution"). "Expenditures" include "independent expenditures," that is, expenditures by a non-candidate for any "political advertising" that (1) "is made in support of or in opposition to a candidate for office"; (2) is

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[7] For these reasons alone, the United States, the Campaign Legal Center and other of petitioners' *amici* inaptly equate the respective governmental interests served by the Washington campaign finance law and FECA, which, unlike the Washington law, was enacted in part to protect the prerogatives of individual members, employees and shareholders who might not support the organization's political choices. *See Federal Election Commission v. Beaumont*, 539 U.S. 146, 154-55 (2003); *Federal Election Commission v. National Right to Work Committee*, 459 U.S. 195, 207-08 (1982).

[8] The Washington campaign finance law's regulation of ballot measure activity is another feature that sharply distinguishes that law from FECA, which regulates only partisan elections of federal candidates and does not regulate any process, electoral or otherwise, by which laws are enacted. The record in the case at bar reflects that respondent WEA has engaged only in ballot measure activity among the contributions and public expenditures regulated by the state's campaign finance law. As the WEA explains in its merits brief, ballot measure activities are constitutionally distinguishable from both expenditures and contributions concerning candidate elections, *see generally Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), and Section 760's impairment of the WEA's spending on those activities alone warrants that the Court determine that Section 760 cannot be enforced against the WEA. But it is also the case that Section 760 is constitutionally deficient as applied to participation by the WEA and other unions in Washington candidate elections, as we demonstrate here.

not made following a candidate's "encouragement or approval," or with the candidate's "collaborat[ion]"; (3) "specifically names" or otherwise "clearly and beyond any doubt names the candidate"; and (4) has a value of at least $500 either by itself or when added to other such expenditures. Wash Rev. Code § 42.17.020(28). Except as constrained by Section 760, unions, like all other groups in Washington, may use their general treasury funds in Washington without restriction for all political expenditures, including advocacy that supports or opposes particular state candidates.

"[R]estrictions on independent expenditures [in candidate elections] significantly impair the ability of individuals and groups to engage in direct political advocacy and 'represent substantial . . . restraints on the quantity and diversity of political speech.'" *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 578 U.S. 604, 615 (2000), quoting *Buckley v. Valeo*, 424 U.S. 1, 19 (1976). Such restrictions are accorded strict scrutiny under the First Amendment and "must be narrowly tailored to serve a compelling governmental interest." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 666 (1990).

The Court has deemed the compelling governmental interests that underlie FECA to justify its prohibition of unions (and corporations) from using their general treasury funds for both "express advocacy" and "electioneering communications." *See McConnell v. Federal Election Commission*, 540 U.S. at 205-06. But, since *Buckley*, the Court has recognized no governmental interest justifying expenditure limits because the interest in preventing corruption or its appearance is "adequately addressed by contribution limitations and disclosure requirements." *See Randall v. Sorrell*, 126 S. Ct. 2479, 2488 (2006) (collecting cases).

Again, that is the sole governmental interest that underlies Initiative 134. Yet Washington, unlike the Congress, has determined that this interest does *not* warrant any restriction

on union or other group political advocacy. Thus, Section 760's restraint on a union's political expenditure of funds that are lawfully in its possession is no more relevant to preventing corruption or its appearance in Washington than would be a monetary limit on the amount a union could spend on that speech. Not only is Section 760 not narrowly tailored to serve a compelling governmental interest in Washington, it does not serve such an interest at all.

C. As described above, Washington does limit, almost uniformly, the amounts that unions and other groups may contribute to state candidates, political parties and other political committees. Political contribution limits "'implicate fundamental First Amendment interests,' namely, the freedoms of 'political expression' and 'political association'." *Randall v. Sorrell,* 126 S. Ct. at 2491, *quoting Buckley v. Valeo*, 424 U.S. at 15. In particular, limits "restrict 'one aspect of the contributor's freedom of political association,' namely the contributor's ability to support a favored candidate." *Randall, id.*, quoting *Buckley*, 424 U.S. at 24. But because contribution limits do not impair First Amendment rights to the same degree as do expenditure limits, they must be "'closely drawn' to match a 'sufficiently important interest'" in order to survive constitutional review. *Randall, id.*, quoting *Buckley*, 424 U.S. at 25.

Again, the only interest underlying Washington's campaign finance law is the prevention of corruption and its appearance. But that interest, as in *Randall*, *Nixon* and *Buckley,* is fully served by the statutory contribution limits themselves. By imposing near-uniform caps on what any contributor, whether individual, union, corporation or other entity, may give to any candidate or other political recipient, the state law both restricts the amount of influence that might result from a contribution and informs the general public that no individual or group enjoys an edge over any other in making such contributions. "Under RCW 42.17.640, the

intent to reduce the influence of large organizational contributors is *achieved* by imposition of a maximum contribution limit on all donors." *State ex. rel. Evergreen Freedom Foundation v. Washington Education* Association, 140 Wash. 2d at 638, 999 P.2d at 615 (emphasis added).

In this regard, the Washington campaign finance law matches means to ends in much the same manner as does FECA. In *Buckley v. Valeo*, 424 U.S. at 26-28, the Court upheld FECA's then-$1,000 per-election contribution limit to federal candidates because that restriction served FECA's "primary purpose to limit the actuality and appearance of corruption" by "focus[ing] precisely on the problem of large campaign contributions—the narrow aspect of political association where the actuality and potential for corruption have been identified—while leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources." *See also Nixon v. Shrink Missouri Government PAC*, 528 U.S. at 388-89. The Court has upheld other FECA contribution limits because they serve the closely related purpose of preventing circumvention of that $1,000 limit. *See California Medical Association v. Federal Election Commission*, 453 U.S. 182, 197-99 (1981) ($5,000 annual limit on contributions by individuals and unincorporated associations to multi-candidate political committees); *Buckley v. Valeo,* 424 U.S. at 35-36 ($25,000 annual limit on individual aggregate contributions to federal recipients); *id.* at 38 ($5,000 annual limit on contributions by political action committees to candidates). *Cf. Federal Election Commission v. Beaumont*, 539 U.S. at 160 (upholding prohibition of contributions by ideological non-profit corporations in part because they are "no less susceptible than traditional business companies to misuse as conduits for circumventing the contribution limits imposed on individuals").

But no related or further anti-corruption interest is served by the distinct requirement imposed by Section 760 that a union secure special permission from the small fraction of those it represents who are not its members before their agency fees may be used in part to contribute within the common statutory limits.

First, whether or not a union's contribution "uses" nonmembers' agency fees, it is the *union* that is contributing in its own name using resources over which it has previously gained lawful possession; the fee payer does not "contribute" under Washington law whether or not he or she has authorized the union to include his or her moneys among those the union uses for contributions. Likewise, any perceived influence secured by a contribution is attributed to the union and not to any individual nonmember, and it is the union, not the nonmember, that undertakes "the undifferentiated, symbolic act of contributing" that conveys "a general expression of support for the candidate and his views. . . ." *Buckley v. Valeo*, 424 U.S. at 20, 21.

Second, Washington does not consider that any *component* of a union's or other organization's funds has any more corruptive potential than does any other component that, by some method of accounting, might be said to be used for contributions. Indeed, Section 760 could hardly be characterized as preventing "circumvention" by individual nonmembers of their own political contribution limits.[9]

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[9] In fact, Section 760 could be construed, however perversely, as *facilitating* such circumvention insofar as it prompts nonmembers to approve the union's use of their fees to make contributions to recipients to whom those nonmembers might otherwise contribute directly. Nonetheless, Washington campaign finance law does *not* treat a union's contribution as the contribution also by any nonmember who authorizes the union to use his or her agency fees for that spending. Again, that law reposes on the union full responsibility for the contribution.

Accordingly, Section 760's restriction of a union's ability to contribute its general treasury funds to political recipients does not serve the state's anti-corruption purpose.

4. That Section 760 falls uniquely on labor organizations further severely undermines its credibility and utility in serving either the state's anti-corruption purpose or even the individual-rights purpose asserted by the petitioners. Washington does not treat union treasury funds, when used for contributions, as having any greater potential to corrupt than other groups' funds. Innumerable other organizations in Washington amass their treasuries, in whole or in part, from sources such as commercial transactions, investments, contributions (either for general or unarticulated uses), dues, fees and stock purchases. Yet the state does not in any manner restrict how other "persons"—including any "partnership, joint venture, public or private corporation, association, . . . or political committee . . . or any other organization or group, however organized," Wash. Rev. Code § 42.17.020(35)—may make political expenditures or contributions in state elections with their lawfully accumulated treasury funds.

Like nonmember agency fee payers, these sources may include groups and individuals "who have paid money into a corporation or union for purposes other than the support of candidates . . . to whom they may be opposed." *Federal Election Commission v. National Right to Work Committee*, 459 U.S. at 208. Indeed, shareholders of corporations and corporate members of trade associations in particular have strong economic disincentives to terminate their voluntary affiliations with those groups even when they disagree with their organization's political choices, *Austin v. Michigan Chamber of Commerce*, 494 U.S. at 663, yet Section 760 confers no affirmative-authorization prerogative upon them. And, a corporation's general treasury is *less* reflective of its constituents' views than is that of a union precisely because of the objection procedure to which agency fee payers are

entitled. *See id.* at 666. No justification appears why nonmembers of unions alone are accorded the special and constraining prerogative to dictate *at the outset* whether or not the organization may apply their moneys to political uses.

Moreover, Section 760 is under-inclusive and therefore constitutionally deficient in another important respect: it targets only the *electoral* spending of unions, just one of the categories of union spending that are subject to an agency fee payer's established right to object. "The fact that a particular kind of [union] spending has been singled out for special treatment undermines the likelihood of a genuine state interest in protecting [nonmembers of unions.] It suggests instead that the [state] may have been concerned with silencing [unions] on a particular subject." *First National Bank of Boston v. Bellotti*, 435 U.S. at 793. Such content-based restrictions on speech are particularly suspect under the First Amendment, *see R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992), and "diminish the credibility of the government's rationale for restricting speech in the first place." *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994). Section 760 is grossly under-inclusive, and the petitioners' *post hoc* justifications for it should be accorded no constitutional force.

II. SECTION 760 DOES NOT PROTECT THE FIRST AMENDMENT RIGHTS OF AGENCY SHOP FEE PAYERS.

In labor relations systems providing that groups of employees may select a union as the group's exclusive representative, it is common to also provide for the negotiation of "an 'agency shop' arrangement, whereby every employee represented by a union—even though not a union member—must pay to the union, as a condition of employment, a service fee equal in amount to union dues." *Abood v. Detroit Board of Education*, 431 U.S. 209, 211 (1977). Such an "arrangement has been thought to distribute fairly the cost of

[the union's] activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become 'free riders'—to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees." *Id.* at 222.

In deference to the nonmember's First Amendment right not to be compelled to contribute to political and ideological speech, this Court has developed an agency fee objection jurisprudence that "allows unions to collect [agency fees] and expend [those] funds *over the objection of nonmembers* only to the extent they are used for collective bargaining, contract administration, and grievance adjustment activities." *Marquez v. Screen Actors Guild*, 525 U.S. 33, 36 (1998) (emphasis added). In articulating this body of law, the Court has made clear that "dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee." *Machinists v. Street*, 367 U.S. 740, 774 (1961). *See also Railway Clerks v. Allen*, 373 U.S. 113, 119 (1963); *Abood*, 431 U.S. at 238.

In stating their arguments in the instant case, the Davenport petitioners make a major point of insisting that this Court's statement in *Street*, *Allen* and *Abood* that "'dissent is not to be presumed' . . . applies only to voluntary union members" and not to nonmember fee payers, and they ask the Court to "clarify that nonmembers need not affirmatively object to paying the political and other nonbargaining portion of the compelled fees." Davenport Br. 31 (capitalized as heading in original) & 38.[10] As we show in the argument below, the Davenport petitioners' reading of this Court's decisions rests on a plain misunderstanding of the facts in the cases they cite and on a basic misunderstanding of the nature of the objection

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[10] The State of Washington acknowledges that "nonmembers are required to object in order to claim First Amendment protection, and 'dissent is not to be presumed.'" State Br. 29. *See also* U.S. Br. 29 n. 8.

right. Their request for this Court to overrule this basic aspect of its agency fee objector jurisprudence should therefore be denied.

A. The Davenport petitioners characterize *Street* as "a class action in which the state court certified a mixed class of both union members and nonmembers threatened with discharge for not joining the union." Davenport Br. 32. Be that as it may, the plaintiff class did not include any "voluntary union members," and none of the named plaintiffs purported to represent a class of voluntary members. The "members" included in the plaintiff class were "employees of the railroad defendants who similarly have been compelled by the union shop agreement, against their wishes, to become members of the defendant labor union organizations in order to maintain their employment." *Machinists v. Street*, 215 Ga. 27, 108 S.E.2d 796, 805 (1959). Immediately after describing the plaintiff class represented by the named plaintiffs, the state court described the voluntary members as comprising a defendant class represented by the unions and their officers: "The individual defendants and labor organization defendants *represent all members of said labor organizations defendants*." *Id.* at 802 (emphasis added). Thus, this Court's statement in *Street* that "dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee," 367 U.S. at 774, certainly had nothing to do with "voluntary union members."

This understanding of *Street* is confirmed by *Railway Clerks v. Allen*, *supra*, which was decided only two years later. The complaint in *Allen* alleged that the plaintiffs "[we]re not members of, and [we]re unwilling to join, any of [the] defendant Unions." *Allen v. Southern Railway Co.*, 249 N.C. 491, 107 S.E.2d 125, 125(1959). This Court recognized that the *Allen* plaintiffs "were not union members" when the union security agreement became effective and "refused to pay any part of the moneys required under the Agreement." 373 U.S.

at 116.[11] At trial, "[t]hirteen plaintiffs testified" that "[t]hey were unwilling to join the union" and that "they opposed the use by the union of any of their money (a) for the support or defeat of political candidates and (b) for the support or defeat of legislation." 107 S.E.2d at 127. This Court, relying on *Street*'s statement that "dissent is not to be presumed," held that of the plaintiffs who had not so testified concerning their objections, "[n]o [one] who does not in the course of the further proceedings in this case prove that he objects to [the political] use [of his fees] will be entitled to relief." 373 U.S. at 119. It thus could not be clearer that nonmembers must affirmatively state their dissent in order to be entitled to restrict the union's use of their agency fee payments under *Street*.

The Davenport plaintiffs are equally wrong in their assertion that *Abood v. Detroit Board of Education, supra*, "included [as plaintiffs] both union members who objected to supporting the union's political and ideological activities and nonmembers who also objected." Davenport Br. 33. The *Abood* plaintiffs consisted *only* of *non*member agency fee payers. The *Abood* case originated as two separate lawsuits that were consolidated by the Michigan Court of Appeals. *Abood v. Detroit Board of Education*, 60 Mich. App. 92, 230 N.W.2d 322, 324 (1975). The complaint in *Warczak v. Detroit Board of Education* alleged that the plaintiffs were "unwilling or had refused to pay dues." 431 U.S. at 212. And, the *Warczak* complaint "[n]amed *as defendants . . . all teachers who are members of the* [*union*]." 230 N.W.2d at 323 (emphasis added). The separate complaint filed as *Abood v. Detroit Board of Education* affirmatively alleged that the "Plaintiffs have *not* become members of the Detroit Federa-

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[11] The union security clause at issue in *Allen* had not been applied to require "that employees actually join the union," rather "payment of the uniform exactions required by the Agreement [was treated] as complete compliance therewith." 373 U.S. at 116 n. 2.

tion of Teachers." *Abood v. Detroit Board of Education*, U.S. Sup. Ct. No. 75-1153, Appendix p. 46 (emphasis added).

In their attempt to show that the *Abood* plaintiffs included "union members," the Davenport petitioners cite a footnote in which the *Abood* Court describes "[s]ome of the plaintiffs" in *Warczak* as "Union members [who] were paying agency-shop fees under protest" and "others" as having "joined the Union and paid the fees without any apparent protest." 431 U.S. at 212-13 n. 2. It is clear in context that the Court was referring to "'financial' membership" by which "an employee is a 'member' of the union only in the most limited sense." *Pattern Makers v. NLRB*, 473 U.S. 95, 106 n. 16 (1985). The paragraph to which this footnote is appended notes that the *Warczak* complaint alleges that agency shop fees are expended on "social activities for the benefit of [union] members which are not available to [them as] *non*-members" and on other "activities and programs . . . in which they will have no voice." 431 U.S. at 213 (emphasis added). And, the Court later remarked that "the agency shop before us does not impose th[e] additional requirement" "that each employee formally join the union" and only "require[s] financial support for the union." *Id.* at 218 n. 10. Indeed, the fact that the *Warczak* complaint "[n]amed *as defendants . . . all teachers who are members of the [union]*," 230 N.W.2d at 323 (emphasis added), conclusively demonstrates that the plaintiffs were *not* members.

In *Abood*, the Michigan Court of Appeals concluded that an "employee[] who [is] forced to contribute service fees to a collective bargaining representative . . . must make known to the union those causes and candidates to which he objects" in order to avoid financing those activities. 230 N.W.2d at 327. And, the court of appeals dismissed the complaint on the ground that "the plaintiffs made no allegation that any of them specifically protested the expenditure of their funds for political purposes to which they object." *Ibid.* This Court,

while reversing the lower court's "holding that as a prerequisite to any relief each [plaintiff] must indicate to the Union the specific expenditures to which he objects," went on to hold on the basis of *Allen* that "the employees here *indicated . . . that they opposed ideological expenditures* of any sort that are unrelated to collective bargaining." 431 U.S. at 241 (emphasis added).[12]

In sum, *Street*, *Allen*, and *Abood* all stand for the proposition that "dissent is not to be presumed" among nonmember agency fee payers.

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[12] The Davenport petitioners do correctly describe two of the agency fee cases they cite in this regard, but neither case advances their point.

First, the Davenport petitioners state that some of the plaintiffs in *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), were union members. Davenport Br. 33 citing 466 U.S. at 439 n. 2. However, those *Ellis* plaintiffs alleged that they had "*unwillingly* joined [the union] to comply with a union shop agreement." *Ellis v. Railway Clerks*, 685 F.2d 1065, 1067 n. 2 (9th Cir. 1982) (emphasis added). They were, thus, *not* "voluntary union members." Davenport Br. 31.

Second, the Davenport petitioners assert that in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), "there was no need for nonmembers to 'dissent' within the meaning of *Street*," because "the collective bargaining statute and agreement in *Hudson* authorized the public employer to exact from nonmembers' wages only the 'proportionate share of the costs of the collective bargaining process and contract administration,' not full union dues." Davenport Br. 34 quoting 475 U.S. at 295 n. 1. But the *Hudson* situation—where the governing law provides for the payment of a limited agency fee geared to the union's expenditures that are germane to collective bargaining – has nothing to do with the situation presented in *Street*, *Allen* and *Abood* where the governing law provides for the payment of an agency fee equal to union dues as a general matter and the Court has added that such agency shop arrangements "allow[] unions to collect [agency fees] and expend [those] funds *over the objection of nonmembers* only to the extent they are used for collective bargaining, contract administration, and grievance adjustment activities." *Marquez*, 525 U.S. at 36 (emphasis added).

B. The Court's repeated specification that "dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee," *Street*, 367 U.S. at 774, is not—as the Davenport petitioners seem to think—merely an attempt to reflect the most probable sentiment of the typical nonmember agency fee payer. Rather, the requirement that "dissent . . . must affirmatively be made known to the union by the dissenting employee" goes to the very nature of the right at issue.

In *Railway Employes' Dept. v. Hanson*, 351 U.S. 225, 235 (1953), the Court held that union security agreements are constitutional so long as "[t]he financial support required relates . . . to the work of the union in the realm of collective bargaining" and that "[n]o more precise allocation of union overhead to individual members [is] necessary" than to require of all represented employees the payment of an amount equal to "'periodic dues, initiation fees, and assessments'" paid by union members. The *Hanson* Court cautioned, however, that "if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, [its] judgment will not prejudice the decision in that case." *Id.* at 238.

In *Street*, "[t]he record [was] adequate squarely to present the constitutional questions reserved in *Hanson*." 367 U.S. at 749. In order to avoid deciding these "constitutional questions of the utmost gravity," the *Street* Court construed the Railway Labor Act to "den[y] the authority to a union, over the employee's objection, to spend his money for political causes which he opposes." *Ibid.*

The *Street* Court emphasized that its limiting construction rested squarely on the Railway Labor Act's "safeguarding of rights of dissent." 367 U.S. at 765 (capitalized heading in original). Noting that "Congress incorporated safeguards in the statute to protect dissenters' interests," the Court found

that "[a] congressional concern over possible impingement on the interests of individual dissenters from union policies is therefore discernible." *Id.* at 765-66. And, the Court concluded that it would "respect this congressional purpose [to] construe § 2, Eleventh as . . . denying the unions the rights, over the employee's objection, to use his money to support political causes which he opposes." *Id.* at 768. Because "[t]he safeguards of § 2, Eleventh were added for the protection of dissenters' interests," the Court made clear that any remedies under that section "would be properly granted only to employees who have made known to the union officials that they do not desire their funds to be used for political causes to which they object." *Id.* at 774. It was in this regard that the Court emphasized "dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee." *Ibid.*

In *Abood v. Detroit Board of Education*, *supra*, the Court considered whether "an 'agency shop' arrangement, whereby every employee represented by a union—even though not a union member—must pay to the union, as a condition of employment, a service fee equal in amount to union dues . . . violates the constitutional rights of government employees who object to public-sector unions as such or to various union activities financed by the compulsory service fees." 431 U.S. at 211.

The *Abood* Court began by observing that the decisions in *Hanson* and *Street* "on their face go far toward resolving the[se] issues." 431 U.S. at 217. Addressing the first issue, i.e., whether the agency shop "violates the constitutional rights of government employees who object to public-sector unions as such," *id.* at 211, the Court held that "insofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment, those two decisions of this

Court [i.e., *Hanson* and *Street*,] appear to require validation of the agency-shop agreement before us," *id.* at 225-26.

Addressing the second issue, the *Abood* Court held that nonmembers "may constitutionally prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative" but that "the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by *employees who do not object to advancing those ideas*." 431 U.S. at 234 & 235-36 (emphasis added). And, in "devis[ing] a way of preventing compulsory subsidization of ideological activity by employees who object thereto," the *Abood* Court closely followed *Street* and *Allen*, expressly endorsing their basic proposition "that 'dissent is not to be presumed' and that only employees who have affirmatively made known to the union their opposition to political uses of their funds are entitled to relief." *Id.* at 237 & 238.

In sum, the *Street/Abood* line of cases prevents "the exaction of dues, initiation fees, or assessments" from being "used as a cover for *forcing* ideological conformity . . . in contravention of the First Amendment," *Hanson*, 351 U.S. at 238 (emphasis added), by "den[ying] the authority to a union, *over the employee's objection*, to spend his money for political causes which he opposes," *Street*, 367 U.S. at 749 (emphasis added). These cases are thus concerned precisely with "safeguard[ing] [the] right[] of dissent." *Street*, 367 U.S. at 765, and protect "only employees who have affirmatively made known to the union their opposition to political uses of their funds," *Abood*, 431 U.S. at 238. *See Communications Workers v. Beck*, 487 U.S. 735, 746 (1988) ("[*Street*] held that § 2, Eleventh of the RLA does not permit a union, over the objections of nonmembers, to expend compelled agency fees on political causes."); *Keller v. State Bar of California*, 496 U.S. 1, 13 (1990) ("*Abood* held that a union could not

expend a dissenting individual's dues for ideological activities not 'germane' to the purpose for which compelled association was justified: collective bargaining.").

C. We would add that there are reasons that a union-represented employee might refrain from becoming a union member other than opposition to the union's activities that are not germane to collective bargaining.

The most likely reason is that joining the union entails a commitment to actively support the union's efforts that goes far beyond the passive payment of agency shop fees. In particular, an employee who "formally . . . join[s] a union . . . subject[s] himself to its discipline" during the period of membership and can be fined for breaking the union's rules. *Pattern Makers*, 473 U.S. at 106. Moreover, the act of formally joining in itself demonstrates a commitment to the union's cause that the employee might reasonably fear would be viewed as disloyal by his or her employer.

There is very little reason to think that an employee who does not state an objection opposes the vast majority of union activities that are not germane to collective bargaining. For instance, a non-objecting fee payer is at least as likely to support as he or she is to oppose the WEA's efforts to pass tax levies needed to fund schools at which WEA-represented teachers work as well as WEA's opposition to school voucher and charter school initiatives that would drain resources away from WEA-represented schools. And, it is difficult to see why any WEA-represented teachers would oppose the union's support of initiatives to reduce class size and to provide cost-of-living adjustments in the wages of education employees.

The agency fee objector law developed under *Street* and its progeny requires unions to inform nonmember agency fee payers of their right to object. *See Marquez v. Screen Actors Guild*, 525 U.S. at 43. And, elaborate rules have been developed concerning the information that must be conveyed

to explain this right and the method by which unions handle objections. *See* "Guidelines for Response to *Beck*-Related Public Inquiries," GC Memorandum 01-04 (April 6, 2001), available at www.NLRB.gov. Given these rules, the more likely explanation for a nonmember's failure to take the simple step of lodging an objection to a union's nongermane expenditures is that many of those expenditures, although not chargeable to objectors under the precedents, nevertheless further the employment-related interests of the represented employees. *See, e.g., Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 520 (1991) (holding "lobbying activities relate[d] . . . to financial support of the employee's profession or of public employees generally" to be nonchargeable to objecting fee payers).

CONCLUSION

The judgment of the Supreme Court of Washington should be affirmed.

Respectfully submitted,

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